COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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No. 95-1014

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ANTON CHANLYNN and TERRI and LANCE CHANLYNN,

Plaintiffs-Respondents,

v.

CHANCERY RESTAURANT and THE TRAVELERS INSURANCE COMPANY,

Defendants-Appellants.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

NETTESHEIM, J. The Chancery Restaurant appeals from an order denying its motion for reconsideration[1] after the trial court determined

[1] The order appealed denies both the Chancery's motion for a new trial and its motion for reconsideration seeking dismissal of the complaint. On appeal, the Chancery asks that we dismiss the complaint, not grant a new trial. We therefore construe the Chancery's appeal as only from the denial of its reconsideration motion.

at a small claims bench trial that the Chancery was causally negligent and had violated the safe-place statute. The judgment was based on an incident in which Anton Chanlynn was injured when his seven-year-old cousin, Aaron Mulhollen, pushed him over the edge of a boardwalk owned by the City of Racine which adjoins the Chancery property.

On appeal, the Chancery challenges the trial court's negligence, causation, comparative negligence and damage determinations. We reject the Chancery's arguments. We affirm the order denying reconsideration and confirming the judgment.

FACTS

The Chancery is located on the shores of Lake Michigan in the City of Racine. Attached to the internal dining area is a screened porch area which is also available for the use of the restaurant patrons. This porch area is serviced by a screen door leading to a boardwalk owned by the city. The boardwalk overlooks the shore of Lake Michigan.

On the evening of July 31, 1994, Anton, age six, and his parents, Terri and Lance Chanlynn, dined with several relatives and friends at the Chancery. The group included Anton's uncle, Gary Mulhollen, who attended with his seven-year-old son Aaron, who is autistic. The family kept their dining plans despite a commotion earlier that afternoon involving Aaron. In that incident, Aaron had to be physically restrained by his mother after he had sprayed water on Anton and Terri when they stepped on an area of grass he was tending. During the episode, Aaron told Anton that he hated him.

At the restaurant, Anton and Aaron participated in a coloring book activity, and there was no indication that they were not getting along. Near the end of the meal, Mulhollen and Aaron left the table. Anton asked his mother, Terri, if he could go along. Terri gave her permission, thinking the group was going to the rest room. Anton's father, Lance, later stated that he thought the group was going to the boardwalk just outside the restaurant.

Mulhollen led Aaron and Anton out of the dining room to the screened porch area where other restaurant patrons were seated.[2] There, Mulhollen stopped briefly to greet a friend from high school, but the boys continued through the screen door onto the boardwalk.

Aaron and Anton were visible to the Chanlynn table through a common glass wall between the main dining area and the porch area. Terri's sister, Patricia Fiorita, was looking out the window and observed the boys run out the door and perch themselves on the edge of the boardwalk. She said, "[M]y gosh, the kids are going outside," and described the boys' actions to the others at the table. She stated that Aaron got up and ran away from Anton, then turned suddenly and ran back towards him. Fiorita declared, "[M]y God, it looks like he's going back and he's gonna push Tony [Anton]." She watched as Aaron pushed Anton on his left shoulder, sending him over the edge of the boardwalk.

[2] According to the restaurant manager, the porch area had been open to customers for approximately one month.

Terri and Lance responded to Fiorita's exclamations and rushed outside, assuming that one of them would have to dive in the water to save their child. When they looked over the edge of the boardwalk, they saw Anton lying approximately nine feet below on a pier. An ambulance transported Anton to a local hospital emergency room where he was x-rayed and examined. He suffered contusions on his ribs, elbows and legs, and swelling on his right elbow.

The day after the accident, the Chancery contacted the City of Racine, which owns the boardwalk, and informed the city of the danger. In response, the city erected a fence and sawhorse barricades in the area.

On December 16, 1994, the Chanlynns commenced this small claims action against the Chancery seeking damages for Anton's injuries and the parents' loss of consortium and emotional distress. They alleged that the Chancery was negligent and had violated the safe-place statute. The Chancery denied the allegations and also counterclaimed for dismissal of the complaint alleging that the parents were negligent in their supervision and control of Anton.[3] No other persons or entities were made parties to the action.

At the bench trial, the evidence focused on whether the Chancery was negligent for allowing children to pass unimpeded through the screen door onto the boardwalk. The Chancery claimed that the door was a fire door, that it bore a sign which read "fire exit only," and that the law required free and

[3] We question the use of a counterclaim by the Chancery since it sought no affirmative relief against the Chanlynns. We view the counterclaim more in the nature of an affirmative defense.

unrestricted passage. In addition, the Chancery argued that Anton's parents, Aaron, Mulhollen and the city were either individually or collectively responsible for the accident.

The trial court ruled in favor of the Chanlynns. The court's bench decision said, in part:

> [The Chancery] had a duty to its patrons, including children, to insure that they would be kept safe. As to children, that was a duty to insure that the normal proclivities and tendencies of children to explore and go beyond what adults would find as limits was taken into consideration; particularly given that the situs of this restaurant was immediately adjacent to Lake Michigan.

The trial court determined that by allowing children unrestricted passage through the screen door, the Chancery was negligent both under the common law and under the safe-place statute.

The trial court also found Mulhollen causally negligent for failing to properly supervise Aaron and Anton while they were under his temporary supervision when the group left the dining table. The court allocated 75% of the negligence to the Chancery and 25% to Mulhollen. The court declined to find Aaron, Anton's parents or the city negligent in the incident.[4]

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[4] The trial court's ruling as to Aaron and Mulhollen was based on the court's substantive assessment of the evidence, even though these persons were not named as parties in the action. This court's procedure was correct since party status is not a prerequisite to a determination that an actor was negligent. *See* ***Pierringer v. Hoger***, 21 Wis.2d 182, 192, 124 N.W.2d 106, 112 (1963).

However, in refusing to consider the alleged negligence of the city, the trial court appears to have based its ruling on the fact that the city was not a party. This approach seems to be inconsistent with the court's willingness to consider the possible negligence of other nonparties and contrary to

The trial court awarded Anton damages of $5000. In addition, the court awarded the parents emotional distress damages of $500 each and medical expenses in the amount of $629.80. The court then reduced this total award to $4000, the jurisdictional damage limit for a small claims action. *See* § 799.01(1)(d)1, STATS.[5]

The Chancery brought a posttrial motion asking the trial court to reconsider its decision by amending its findings of fact and conclusions of law pursuant to § 805.17(3), STATS. Specifically, it argued that: (1) the Chancery owed no duty of supervision over child patrons on its premises; (2) the Chancery's negligence, if any, was not causal; (3) Aaron and Anton's parents were also negligent; (4) Mulhollen's negligence exceeded 25%; (5) the court should have considered the city's alleged negligence; and (6) the damages were excessive.[6]

The trial court denied the Chancery's motion for reconsideration. The Chancery appeals.

DISCUSSION

(..continued)
Pierringer. Nonetheless, as we will later explain, this issue is not properly before us on appeal from the court's reconsideration ruling.

[5] On the reconsideration motion, the trial court vacated the parents' emotional distress damage awards. That ruling is not before us.

[6] Most of the grounds argued by the Chancery on appeal were matters asserted in support of its motion for a new trial, not in support of its motion for reconsideration. Since the only trial court order before us is the court's denial of the reconsideration order, the prospect of waiver exists as to many of the Chancery's appellate arguments. However, the Chanlynns do not argue waiver and we will not employ it against the Chancery.

The Law of Reconsideration

The Chancery's appeal is not from the trial court's judgment; rather, the appeal is from the court's posttrial order denying reconsideration. This requires that we first define which of the Chancery's appellate issues are properly before us. We stress that this discussion concerns only the limits of our *appellate* review of a reconsideration ruling; it does not pertain to, or govern, a trial court's authority to reconsider a matter. Indeed, reconsideration motions before the trial court are encouraged. *See* ***Harris v. Reivitz***, 142 Wis.2d 82, 89, 417 N.W.2d 50, 53 (Ct. App. 1987).

In ***Ver Hagen v. Gibbons***, 55 Wis.2d 21, 25, 197 N.W.2d 752, 754 (1972), the supreme court noted that "an order entered on a motion to modify or vacate a judgment or order is not appealable where … the only issues raised by the motion were disposed of by the original judgment or order." In such a case, the appealing party will not be heard to relitigate the matter disposed of by the prior judgment or order. *See* ***id***. at 26, 197 N.W.2d at 755. Thus, ***Ver Hagen*** holds that an appeal from a reconsideration ruling must raise "issues other than those determined by the order or judgment for which review is requested." ***Id***.

While the ***Ver Hagen*** statement is direct in its utterance, its application has proven troublesome. In ***Harris,*** the trial court dismissed a declaratory action because the plaintiff had failed to exhaust his administrative remedies. ***Harris***, 142 Wis.2d 88, 417 N.W.2d at 52. The plaintiff sought reconsideration, arguing, inter alia, that the exhaustion doctrine did not apply to declaratory actions, an argument he had not made in the prior proceedings.

Id. The trial court rejected the reconsideration request. ***Id***. at 86, 417 N.W.2d at 51.

The ***Harris*** court saw the ***Ver Hagen*** decision as liberalizing the prior rules governing appealability of reconsideration rulings. ***Harris***, 142 Wis.2d at 89, 417 N.W.2d at 53. As such, ***Harris*** determined that the ***Ver Hagen*** test should be applied liberally. ***Harris***, 142 Wis.2d at 88, 417 N.W.2d at 52-53. Applying these principles, the ***Harris*** court concluded that the plaintiff's reconsideration motion was reviewable on appeal because it raised new issues not asserted in the original proceeding. *See* ***id***. at 89-90, 417 N.W.2d at 53.

However, at the other end of the spectrum, we observe that a motion for reconsideration, by its very terms, connotes that the trial court has already considered the matter. *See* ***O'Neill v. Buchanan***, 186 Wis.2d 229, 234, 519 N.W.2d 750, 752 (Ct. App. 1994). As such, a party will not be heard to introduce a foreign issue into the proceedings via a reconsideration motion.

Standards of Review

We next address our standards of review. A motion for reconsideration is addressed to the trial court's discretion. *See* ***Conrad v. Conrad***, 92 Wis.2d 407, 414-15, 284 N.W.2d 674, 677-78 (1979). We will not disturb the trial court's determination absent an erroneous exercise of that discretion. *See* ***Baird Contracting, Inc. v. Mid Wisconsin Bank***, 189 Wis.2d 321,

324, 525 N.W.2d 276, 277 (Ct. App. 1994). A trial court properly exercises its discretion when it examines the relevant facts, applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Id***.

To the extent a discretionary ruling rests on factual determinations, we review such under the clearly erroneous standard. Section 805.17, STATS. To the extent a discretionary ruling rests on a legal standard, we review such determinations independently. *See* ***Kellar v. Lloyd,*** 180 Wis.2d 162, 184, 509 N.W.2d 87, 95 (Ct. App. 1993); ***Geiger v. Milwaukee Guardian Ins. Co.,*** 188 Wis.2d 333, 335-36, 524 N.W.2d 909, 910 (Ct. App. 1994).

Analysis

The Chancery first argues that the trial court erred by premising its negligence finding on the Chancery's failure to lock the screen door or to otherwise limit the ability of children to freely pass through the door. This was the predominant issue at the trial. The Chancery argued that the door was a fire door which had to be kept unlocked under the law. However, at the trial, the Chancery never provided the trial court with any express legal authority or citation in support of this argument. As the trial court pointedly observed at the later reconsideration hearing, simply saying the door was a fire door did not make it so.

At the reconsideration hearing, the Chancery, for the first time, cited to the Wisconsin Administrative Code and its possible application to this case. However, in making this argument, the Chancery now argued that the

screen door was an exit door, not a fire door. In support, the Chancery cited to WIS. ADM. CODE § ILHR 51.15(3)(h)1 which speaks to "standard exit doors." This section does not specifically refer to fire doors whereas other sections of the code do. *See, e.g.*, WIS. ADM. CODE §§ ILHR 51.01(43), (44), 51.047.

Perhaps the Chancery believes that the exit door provisions of the administrative code also apply to fire doors. If so, the Chancery did not enlighten the trial court on this point. Neither does it enlighten us on appeal. If that was the Chancery's point, it was obligated to convey this stance with clarity to the trial court.

Based on the record, we conclude that the Chancery's reconsideration argument was more than simply injecting a different argument on an issue which was litigated at the trial. Rather, it was injecting a new and different theory of defense. As such, we conclude that the reconsideration motion went beyond the perimeters of ***Ver Hagen***, and we decline to review the issue on appeal.

Alternatively, even if we were to countenance this argument under ***Ver Hagen***, we reject it. Assuming arguendo that the exit door administrative code provisions belatedly cited by the Chancery apply to fire doors, the evidence was insufficient to allow a finding that the screen door was, in fact, a fire door governed by those rules. The trial court's statement at reconsideration says as much:

> This was a screen door. Simply because one says over and over and over again that it's a fire door doesn't make it a fire door. … The fact finding made by the Court is that this is a screen door to provide access and

> ambience to the restaurant itself that allowed anyone simply to walk outside. It is not specifically a fire door.

By this remark, the trial court was functionally saying that it had not been shown sufficient evidence demonstrating that this screen door qualified as a fire door governed by the administrative code. We agree. The evidence presented at the trial failed to address the many standards and requirements of the administrative code which bear upon the location, construction and maintenance of standard exit doors and fire doors. In order to meaningfully answer this new issue, the trial court would have had to reopen the evidence. That is not the function of a reconsideration motion.

The trial court did not misuse its discretion by rejecting this portion of the reconsideration motion.

Next, the Chancery contends that the trial court erred in its determination that the Chancery was negligent for failing to warn of the danger posed by the boardwalk. However, a reading of the trial court's bench decision at the conclusion of the trial reveals that *the court never found the Chancery negligent on this ground.* The court never uttered a word or phrase invoking this concept of negligence.

Instead, it was the Chancery which introduced this concept (and then only obliquely) into the proceedings at the reconsideration hearing. The Chancery argued that because the boardwalk was an open and obvious danger, the Chancery had no duty to warn of its presence. By this method, the

Chancery lured the trial court into a discussion of this matter, and, at one point, the court did say that the Chancery had failed to warn of the danger. Despite this remark, the fact remains that *the judgment* against the Chancery is not premised on any finding that the Chancery was negligent because it failed to warn of the danger. Therefore, even if we disagree with the court's statement at the reconsideration hearing, it would have no bearing on the judgment. The Chancery's "duty to warn" argument introduced a totally foreign issue into the reconsideration proceedings. As such, the matter is not properly before us on appeal. *See* ***O'Neill***, 186 Wis.2d at 234, 519 N.W.2d at 752.

Next, the Chancery argues that the trial court erred in finding that the Chancery was negligent for failing to erect a railing or fencing on the boardwalk because the property was owned by the city. Presumably, the Chancery bases this argument on the trial court's following statement in its bench decision at the trial:

> The restaurant was simply not maintained as safe as the nature of the business permitted. The fire door could be opened by the children. There was not fencing around the precipice or the edge or the walkway so that a person could fall into the pier or into the water. A hazardous condition existed. That condition caused the accident for these two children in terms of—actually one child actually touched or brushed the other, but their ability to get to that location was caused by the condition, the hazardous condition that the restaurant was responsible for.

On a threshold basis, we hold that this matter is not properly before us on appeal of the reconsideration order. While the Chancery raised

various issues on reconsideration, this aspect of the Chancery's conduct was not addressed by the reconsideration motion or by the reconsideration proceedings. The above quote comes from the trial proceedings, not the reconsideration proceedings.

Alternatively, we reject the Chancery's argument on the merits. We must read the trial court's statements and findings in context. As we have noted, the principal focus in this case was whether the Chancery was negligent in allowing children unrestricted passage through the screen door to the area of danger. The evidence clearly established that the city owned the boardwalk and that the Chancery did not have control or authority over it. We do not reasonably read the trial court's remark as holding that the restaurant had to maintain the property of another.

Rather, we read the trial court's remarks as acknowledging the dangerous condition which the boardwalk represented to children and, in light of that condition, requiring the Chancery to take steps to protect its young patrons from freely gaining access to the dangerous area. This reading is borne out by the trial court's statement a few lines later in the transcript:

> [T]here had been discussions relating to [the dangerous condition] prior to opening the porch area in the end of June or early July, and the fact that the city or whomever owned the walkway didn't take action does not absolve the restaurant of responsibility *when it allowed through its negligence* young patrons … to go out onto the walkway *because the fire door was not locked.* [Emphasis added.]

From this, it becomes clear that the trial court premised the Chancery's negligence on its failure to secure the door, not on any failure to take corrective action on the boardwalk which was owned by the city. This is a subtle but important distinction.

Next, the Chancery argues that its negligence was not causal. We will assume arguendo that this contention is properly before us on this appeal.

Negligence and causation are separate inquiries, and a finding of cause does not automatically follow from a finding of negligence. ***Fondell v. Lucky Stores,*** 85 Wis.2d 220, 226, 270 N.W.2d 205, 209 (1978). When a safe-place violation has been proven, the law presumes the damage was caused by the failure to perform the safe-place duty to maintain the premises as safe as the nature of the place reasonably permits. ***Id.*** at 230, 270 N.W.2d at 211. The presumption is not conclusive in the face of rebutting testimony, and the chain of causation can be refuted by a defendant. ***Id.*** at 230-31, 270 N.W.2d at 211-12.

Here, the Chancery maintains that Mulhollen's failure to supervise the boys and Aaron's intentional conduct was the cause of the accident. Causation is a determination of whether the breach of the duty is a substantial factor in causing the harm from which damages are claimed. ***Id.*** at 227, 270 N.W.2d at 209. An unbroken sequence of events must be proven wherein the negligence of a party is actively operating at the time of the injury-producing accident and this actively operating negligence was a cause in fact of the accident. ***Id.*** at 227, 270 N.W.2d at 210. Here, there was an unbroken sequence

of events, starting with Mulhollen taking Aaron and Anton into the screened porch area. When he stopped to talk to a friend, the boys ran across the room and straight out the door. There was testimony that the chain of events from the time the boys left Mulhollen's side until the time Anton went over the side of the boardwalk was only about ten seconds.

The focus of the inquiry is not about "the cause" of the accident, but rather "a cause" of the accident. WIS J I—CIVIL 1500. The law recognizes that there may be more than one cause of an injury and that the combined negligence of two or more persons may cause such injury. ***Id***. Given the sequence of events, we are satisfied that the Chancery's failure to secure the porch area door was an operating factor in the cause of the accident. The trial court's causation finding is not clearly erroneous.

Next, the Chancery argues that the trial court erred in failing to find Aaron negligent. This matter is not properly before us on appeal under ***Ver Hagen***. The Chancery made the same argument at trial and it offered nothing new on this point at the reconsideration hearing.

Alternatively, we disagree with the Chancery on the merits. In its bench decision at the conclusion of the trial, the trial court noted the natural propensity of children to suddenly vary their behavior from obedience to disobedience, and from relative calm to horseplay. In its reconsideration ruling, the court also noted that Aaron is a seven-year-old autistic child, a condition which the court described as a disability involving moments of anger. Although Aaron was of culpable age, the trial court properly assessed his

conduct in light of the conduct of children generally and Aaron's disability specifically. The court's finding that Aaron was not negligent is not clearly erroneous.

Next, the Chancery disputes the trial court's allocation of 25% of the negligence to Mulhollen, who was immediately supervising Anton and Aaron when the boys passed through the door onto the boardwalk. We will again assume arguendo that this matter is properly before us on appeal.

A fact finder's assessment of comparative negligence is a question of fact, and we will not disturb such a finding if it is based on any reasonable view of the credible evidence. ***White v. Leeder***, 149 Wis.2d 948, 959, 440 N.W.2d 557, 561 (1989). Here, there is no evidence that Mulhollen was previously aware of the danger posed by the boardwalk when he momentarily failed to watch the boys. In contrast, the record is clear that the Chancery knew of such fact. That knowledge, coupled with the Chancery's failure to take reasonable steps to restrict child access to the boardwalk, supports the trial court's factual allocation of the causal negligence. The court's finding is not clearly erroneous.

The Chancery also contends that the trial court erred by declining to find Anton's parents negligent for failing to properly supervise their son. Once again, this issue fails the ***Ver Hagen*** test. The Chancery presented nothing new on this point at the reconsideration hearing.

Alternatively, we uphold the trial court's finding on the merits. The court determined that the parents' temporary surrender of Aaron's custody

to a responsible related adult was not negligence under the facts of this case. We hold that the court's finding is not clearly erroneous.

Next, the Chancery argues that the trial court erred by failing to factor the city's conduct into the negligence equation. As we have previously noted, we have some misgivings about the court's ruling in this regard. *See supra* note 4. However, the trial court rejected this argument in its bench ruling at the trial, and, as we have noted, the Chancery has not appealed from the judgment. The Chancery presented nothing new on this point at the reconsideration proceeding. As such, the issue does not satisfy the ***Ver Hagen*** standard for appellate review. We do not address it further.

Last, the Chancery contends that the trial court's award for Anton's pain and suffering was excessive. We first observe that although the trial court evaluated Anton's damages at $5000, the court properly reduced the amount of actual recovery to $4000, the jurisdictional limit of the small claims court. In addition, the court awarded Anton's parents their medical expenses in the amount of $629.80, further reducing Anton's actual pain and suffering award in round figures to $3370. We deem this latter figure the proper one by which to measure the damage award to Anton.

In making its award, the trial court correctly noted that damages cannot always be fixed with exactness, especially as to pain and suffering. *See* WIS J I—CIVIL 1700(f). The court observed that although Anton's injuries turned

out to be less severe than expected, Anton nonetheless experienced a major fall. The court also observed that pain and suffering were present during the fall, the impact, the time while Anton was lying on the pier awaiting rescue, the ambulance trip to the hospital, the stay in the emergency room and the return trip to the doctor the following day. In addition, the court noted that Anton had to deal with the trauma of the event itself. We see no error in the trial court's damage award.

We affirm the trial court's order denying the Chancery's motion for reconsideration.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.